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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 21 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and as a member of the professions holding an advanced degree. At the time of filing, the petitioner was a graduate student, seeking a doctorate in nutrition at the Pennsylvania State University (Penn State). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

In the denial notice, the director incorrectly allowed the petitioner only 15 days to file an appeal. Pursuant to 8 C.F.R. § 103.3(a)(2)(i), the filing period for an appeal of a denial (as opposed to a revocation) is 30 days, not 15. The issue is moot in this particular instance, because the petitioner filed the appeal within the reduced period, but we note the error here because it is part of a larger pattern seen in many decisions issued by the Vermont Service Center, which could result in timely appeals being wrongly rejected as late. The practice is also prejudicial against petitioners, by cutting in half the amount of time during which they are permitted to prepare their appeals.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the petitioner "has made outstanding contributions in the area of vitamin A metabolism," including cloning a rat gene, CYP26, that produces "retinoic acid hydroxylase . . . , an important enzyme in regulating excretion of excess vitamin A" and studying the expression of that gene. The petitioner's studies of CYP26 and another enzyme, LRAT, relate to the role of vitamin A deficiency in bronchiopulmonary dysplasia (BPD), a lung disease that affects many premature infants.

The director, in denying the petition, concluded that the petitioner has not shown that her work is national in scope. We have held, however, that medical and scientific research at major institutions is inherently national in scope, because the results are disseminated nationally (and internationally) through publications and conferences and because the findings of such research tend to apply universally rather than only locally. We therefore withdraw the director's finding that the petitioner's work lacks national scope.

Counsel states that the petitioner is held in "high esteem . . . in the international and national community of scientists." When discussing the impact and significance of the petitioner's work, counsel observes that the petitioner has published her work in journals, presented at conferences, and received federal grant funding. Regarding this funding from the National Institutes of Health (NIH), counsel states "as a federal government sponsored institution, it would not have funded [the petitioner's] work if its benefits were not of national importance." Objective evidence, rather than counsel's characterizations, must establish the significance of the reaction to the petitioner's work. It can be argued that all responsible research into dangerous diseases is of national importance. The petitioner has not shown that her involvement in the project was a major factor in the NIH's decision to approve the grant application. Rather, the petitioner's thesis advisor, Prof. [redacted] states: "My laboratory's research projects have been funded continuously by the National Institutes of Health since 1980," when the petitioner was eleven years old. Eligibility for the national interest waiver must rest not only on the importance of the subject of research, but also on the merits of the individual alien seeking the waiver.

The petitioner submits several witness letters, examples of which we shall discuss here. Professor [redacted] states that the petitioner has devoted her attention "to the important problem of understanding the regulation of retinoic acid breakdown, at the gene expression level. . . . Her study will be very important for further investigating the mechanism of [BPD]. . . . [T]he skills and disciplines [the petitioner] has learned will continue to be extremely important for future health care research." Prof. [redacted] and other witnesses state that the petitioner has better qualifications than many other graduate students, but they do not clearly indicate how the petitioner's research achievements to date so exceed those of others that it is in the national interest to waive the job offer requirement that normally applies to the immigrant classification the petitioner seeks.

Dr. [redacted] of Johnson & Johnson Pharmaceutical Research and Development describes the work the petitioner undertook during her internship at that company in the summer of 2002:

> Thrombosis is a condition [in which] platelets activated [sic] and aggregate together. This condition leads to several well-known severe cardiovascular diseases, such as stroke, unstable angina, and peripheral vascular disease. To investigate how platelets are activated and coagulate will help us to develop the means to control the thrombosis and reduce the risk of such diseases.
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> [The petitioner] is currently working on a receptor protein, which is implicated in thrombosis. This receptor gene has just been cloned recently, but its function, activation, and downstream events are still unknown. So we have generated [a] knockout mouse, which inactivates (dysfunction) [sic] this protein and create[d] a research model to investigate its gene function. . . . [The petitioner's] work focuses on characterizing the genotype and phenotype of this artificially modified mouse and aims to elucidate the gene function. [The petitioner] has already got some exciting results such as characterized protein expression, function and regulation of this receptor. . . . Her research furthered our understanding of thrombosis and will greatly benefit our new drug development and the United States health care.

All of the witnesses have supervised or worked with the petitioner, and/or have studied under her thesis advisor, Prof. [redacted] The witnesses describe what the petitioner has done in the laboratory, but they do not explain how the petitioner's results are more significant or important than would normally be expected of a qualified researcher performing the same experiments and research. The goal of all scientific research is, arguably, to further our understanding of various phenomena. Conducting successful experiments is a hallmark of professional competence, but not a demonstration of eligibility for the special benefit of a national interest waiver.

The petitioner submits copies of the petitioner's published articles and presentation abstracts, with no indication of how frequently, if at all, other researchers have cited this work. The petitioner also submits material apparently intended to establish exceptional ability as specified at 8 C.F.R. § 204.5(k)(3)(ii). This evidence is superfluous, as the petitioner readily qualifies as a member of the professions holding an advanced degree, and the statutory language unambiguously indicates that aliens of exceptional ability do not automatically qualify for the waiver; such aliens are generally subject to the same job offer requirement as advanced degree professionals.

The director denied the petition, stating that the petitioner has not established that her work has had significant impact outside of the laboratories where she has worked, or that she stands above her peers to an extent that would merit a national interest waiver. On appeal, counsel asserts that the director did not give sufficient consideration to the statements of Prof. [redacted] who "made it absolutely unequivocal that few

scientists possess the unique research skills and multidisciplinary knowledge and expertise the beneficiary has acquired over the years to conduct cutting-edge research and to make groundbreaking achievements in the field of nutritional sciences."

It cannot suffice to state that the alien possesses useful skills, or a "unique background." As noted above, regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. *Matter of New York State Dept. of Transportation* at 221. In this case, at the time of filing, the petitioner was still a student, with several more years of student and postdoctoral training ahead of her before the scientific community would consider her fully prepared for independent employment. It is not impossible for an alien to qualify for a waiver while her training is still ongoing, but she bears the burden of demonstrating that, even at this preliminary stage of her research career, she offers so great a prospective benefit to the country that it is in the national interest to waive the standard requirement of a job offer for which qualified United States workers are unavailable.

Counsel expresses agreement with the director's assertion that frequent citation of one's published work is a good, objective measure of one's impact in the field. Counsel states that the petitioner's work has "frequently been cited in the scientific publications of other scientists." The petitioner submits copies of nine articles that contain citations of her work. The petitioner and/or Prof[redacted] were co-authors of four of the nine articles, and therefore the citations are self-citations. Self-citation is a common and accepted practice, but citing one's own past work can hardly be said to reflect broader impact on one's field. The petitioner has not shown that the remaining five citations are indicative of a particularly heavy citation rate. Furthermore, we note that all of these citations were published well after the petition's November 2002 filing date. Thus, the citations do not continue an already-established pattern, but rather represent an entirely new development that the director could not possibly have taken into account at the time of filing. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). For the same reason, we cannot attach great weight to the petitioner's new job at Johnson & Johnson, where she became a research associate in February 2003. Even if the petitioner had shown that this job is anything other than a standard postdoctoral research position of the type occupied by many new Ph.D.s, this development occurred too late for consideration in the context of the November 2002 filing date.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.